



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 2, 2004

Ms. Lynne Wilkerson
General Counsel
Bexar County Juvenile Probation Department
235 East Mitchell Street
San Antonio, Texas 78210-3845

OR2004-0738

Dear Ms. Wilkerson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 195481.

The Bexar County Juvenile Probation Department (the "department") received a request for information concerning a former department employee. You indicate that the department will release most of the responsive information to the requestor. However, you claim that the remaining information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code. In accordance with section 552.301(e), a governmental body receiving a request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office a copy of the written request for information within fifteen business days of receiving the request. Gov't Code § 552.301(e)(1)(B). In the present case, the department received the request for information on November 3, 2003, but did not submit to this office a copy of the written request until December 3, 2003. Consequently, the department has failed to comply with the fifteen-day deadline mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third-party interests. *See* Open Records Decision No. 630 (1994). Because the exceptions you have claimed can provide compelling reasons to overcome the presumption of openness, we will address their applicability to the submitted information.

You assert that certain information must be withheld pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Under this exception, a governmental body may not disclose information if the disclosure will violate a person's common-law or constitutional rights to privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976).

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.*; *see also Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir 1996), *Abdeljalil v. City of Fort Worth*, 55 F. Supp.2d 614, 625 (N.D. Tex. 1999). This balancing test considers a number of factors, including the potential for harm in any subsequent non-consensual disclosure of the information, and "whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." *Doe v. Attorney Gen.*, 941 F.2d 780, 796 (9th Cir. 1991) (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3rd Cir. 1980)). The scope of information protected by constitutional privacy is

narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." ORD 455 at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

The submitted information includes a notation relating to the former employee's general test results for the Minnesota Multiphasic Personality Inventory ("MMPI"). You contend that this notation is protected from public disclosure under constitutional and common-law rights of privacy. The MMPI is a test administered by Correctional Health Care Services-University Health Systems ("CHCS") as part of the pre-employment psychological screening process for department applicants.¹ The MMPI assumes certain components of the personality and scores people as to these traits on a numerical scale to enable comparison with established norms; a report of an individual's MMPI scores therefore purports to reveal highly intimate information about the individual, including negative characteristics. *See* Open Records Decision No. 600 at 5 (1992) (MMPI scores may reveal, *inter alia*, the applicant's tendency toward hysteria, hypochondria, or mood swings). We have determined that such information implicates an individual's *constitutional* right to privacy as distinct from the individual's *common-law* right to privacy. Open Records Decision No. 600 at 6 (1992) (relying on *Whalen v. Roe*, 429 U.S. 589 (1977), and *McKenna v. Fargo*, 451 F.Supp. 1355 (D.N.J. 1978)). Accordingly, we must apply the constitutional balancing test to determine whether the information at issue is protected from disclosure.

We note that the information that you seek to withhold is not the actual report of the former employee's MMPI scores, but rather a broad assessment derived from these scores. The information at issue does not reveal intimate details of the applicant's personality. Although

¹In your letter to this office, you state that the applicant's scores and test documents are not in the actual or constructive possession of the department. Based on your representations, we have no indication that the department has a right of access to this information. We note that the act does not require a governmental body to disclose information that is not in its actual or constructive possession at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

this information has an obvious connection to the MMPI score, it reflects the department's general impression of the applicant in the context of the hiring process. The notation is an appraisal of the applicant's suitability for employment with the department and as such constitutes information of recognizable public interest. To this extent, the notation is dissimilar to the MMPI "score" contemplated in Open Records Decision No. 600. Consequently, the notation may not be withheld under section 552.101 in conjunction with constitutional or common-law privacy.

The submitted information also includes a copy of one of the former employee's pay receipts. You state the pay receipt reveals the amount of retirement that was withheld, information which can reflect a personal financial decision since department employees can choose to withhold more for retirement than the minimum contribution. In this regard, you indicate that this information is protected by the individual's common-law right of privacy. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. *See* Open Records Decision Nos. 600 (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* ORD 600 at 10. After reviewing the submitted information, it is unclear how the marked information reflects a personal financial decision falling within the protection of common-law privacy; the information at issue may therefore not be withheld under section 552.101 on that basis.

We note that section 552.101 also excepts from disclosure information made confidential by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

You also indicate that the amount of federal tax withheld from the former employee's pay is made confidential under federal law and therefore excepted from disclosure under section 552.101. However, you have not indicated, nor is it apparent to this office, what provision of federal law makes the information at issue confidential. This information may therefore not be withheld under section 552.101.

Next, you assert that certain personal information relating to the former employee must be withheld pursuant to section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform us that, prior to the receipt of the current request, the former employee chose not to allow public access to the personal information protected by section 552.117. The department must therefore withhold the marked information pursuant to that provision.²

Finally, you assert that driver's license information must be withheld pursuant to section 552.130 of the Government Code. Section 552.130 prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, the department must withhold the Texas driver's license information that is marked in the submitted records pursuant to that provision.³

²As we are able to make this determination, we do not reach your argument that the former employee's social security number is also excepted from disclosure under section 552.101 in conjunction with the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).

³As we are able to make this determination, we do not reach your argument that the driver's license information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 730.003 of the Transportation Code.

In summary, criminal history record information obtained from DPS must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. The former employee's home address and telephone number, social security number, and family member information must be withheld under section 552.117 of the Government Code. Texas driver's license information must be withheld under section 552.130 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: (1) release the public records; (2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or (3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-- Austin 1992, no writ).

Please remember that under the act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Steven W. Bartels". The signature is written in a cursive, flowing style.

Steven W. Bartels
Assistant Attorney General
Open Records Division

SWB/seg

Ref: ID# 195481

Enc. Submitted documents

c: Ms. Barbara Griffith
Fort Worth Bureau Chief, WFAA-TV
1200 Summit Avenue, Suite 102
Fort Worth, Texas 76102
(w/o enclosures)